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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

THE TRAVELERS INDEMNITY COMPANY, *Petitioner*,

v.

ERICKSON'S, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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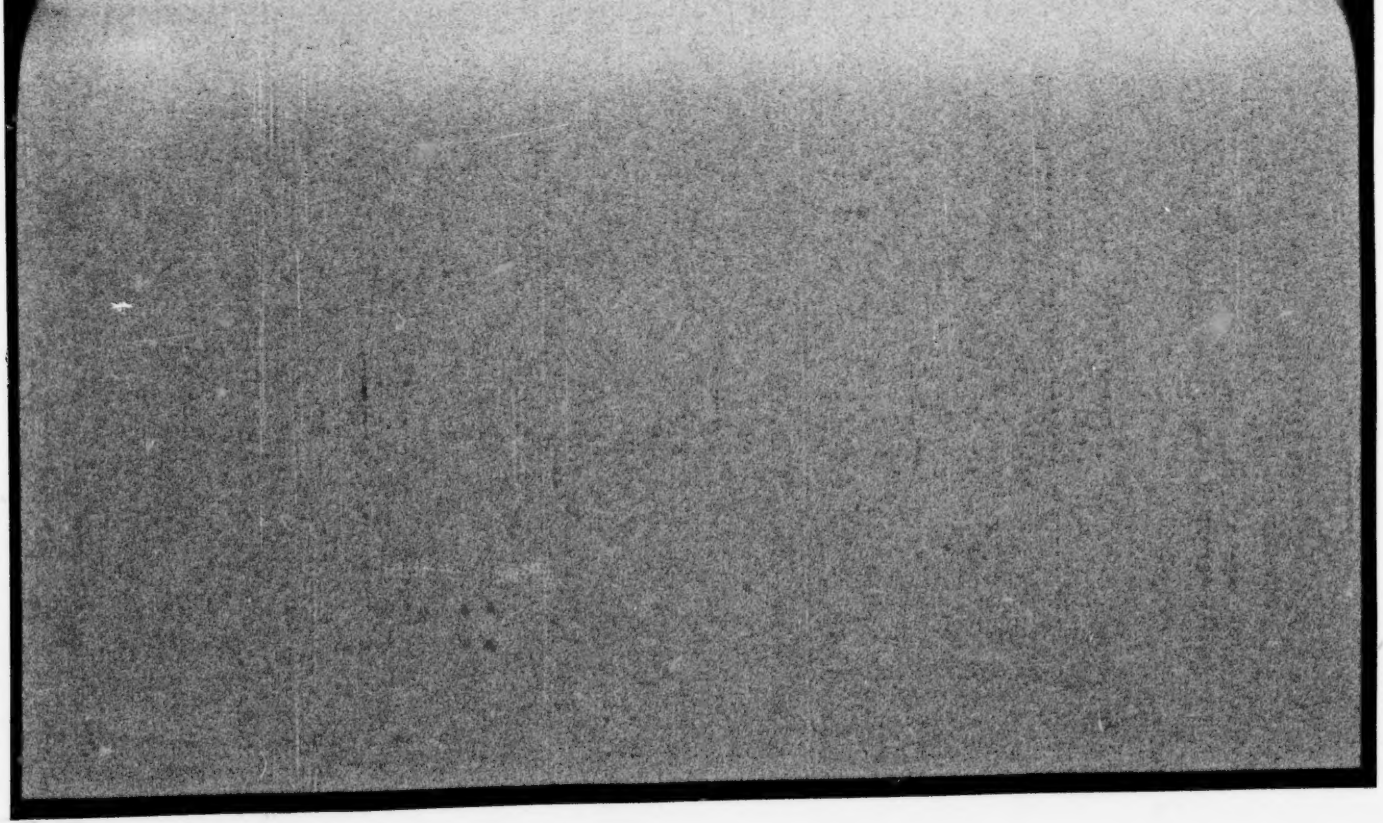

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Pertinent Georgia Statutes	4
Statement of the Case	4
Argument—	
I. The Court of Appeals and the District Judge erred in allowing prejudgment interest on an unliquidated claim, where the same was clearly not recoverable under Georgia law and where said decisions were in conflict with decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia	8
II. The Court of Appeals and the District Judge erred in refusing to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts, which correctly stated the Georgia law and refused to allow prejudgment interest	15
III. The Court of Appeals and the District Judge erred in applying the law of States which allow prejudgment interest, in direct contravention of the rule laid down in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)	17
IV. Conclusion	19
Appendix—	
(1) Opinions, Judgments and Orders of the District Court and the Fifth Circuit Court of Appeals	A1
[A] Report of the Special Master Dated March 15, 1971 in the District Court	A1

Page

[B] Memorandum and Order of Judge Thomas J. Clary of the District Court Dated April 28, 1971 and Entered on May 3, 1971 ..... A7

[C] Judgment Dated May 16, 1971 and Entered on May 20, 1971 by Judge Thomas J. Clary of the District Court A11

[D] Memorandum and Order Dated July 26, 1971 and Entered July 27, 1971 by Judge Thomas J. Clary of the District Court A13

[E] Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit Dated and Entered January 25, 1972 ..... A15

[F] Order of February 24, 1972 Denying Petition for Rehearing A17

(2) Unreported Decisions from the U. S. District Court for the Southern District of Georgia, in which interest was disallowed under the same circumstances presented by the case sub judice.. A17

[A] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, U.S.D.C. S.D. Ga. A18

[B] Report of the Special Master Dated November 6, 1967 in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, U.S.D.C. S.D. Ga. ... A19

[C] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, U.S.D.C. S.D. Ga. A23

[D] Report of the Special Master Dated November 6, 1967 in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, U.S.D.C. S.D. Ga. ... A24

TABLE OF CITATIONS

CASES: Page

Aetna Insurance Company of Hartford, Connecticut v. Taylor, 86 F.2d 225, 227 (5th Cir. 1936) 15
Aetna Casualty & Surety Co. v. U.S., 365 F.2d 997, 1006 (8th Cir. 1966) 18
Brown v. Parks, 190 Ga. 540, 9 S.E.2d 897 (1940) 9, 10
Browne v. Makin, 177 F.2d 753 (5th Cir. 1949) 15, 16
Coffman v. Federal Laboratories, Inc., 171 F.2d 94 (3rd Cir. 1948) 11
Colevins v. National Union Fire Insurance Company of Pittsburgh, Pa., 110 Ga. App. 533, 139 S.E.2d 145 (1964) 9, 13
Cowart v. Reeves, 80 Ga. App. 161, 55 S.E.2d 911 (1949) 9
Eastern Federal Corporation v. Abco-Embassy Pictures Corporation, 331 F.Supp. 1253 (N.D. Ga. 1971) 15
Erickson's, Inc. v. The Travelers Indemnity Company, 454 F.2d 884 (5th Cir. 1972) 2, 8
Erickson's, Inc. v. The Travelers Indemnity Company, 330 F.Supp. 380 (S.D. Ga. 1971) 2, 8
Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 4, 17, 18
Firemen's Insurance Company v. Oliver, 182 Ga. 212, 184 S.E. 858 (1940) 9
First National Bank of Atlanta v. State Highway Department, 219 Ga. 144, 132 S.E.2d 263 (1963) 9
Fluor Corporation v. U. S. ex rel. Mosher Steel Co., 405 F.2d 823 (9th Cir. 1969) 18
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) 4, 17, 18, 19, 20
Lincoln Lumber Company v. Keeter, 167 Ga. 231, 145 S.E. 68 (1928) 9, 12
Lumberman's Mutual Insurance Company of Mansfield, Ohio v. Cantex Manufacturing Company, 262 F.2d 63 (5th Cir. 1958) 13, 14, 15
Marino v. Nevitt, 311 F.2d 406 (3rd Cir. 1963) 11

Page

McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 790, U.S.D.C. S.D. Ga., decided November 1, 1968 ..... 15, 16

McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 791, U.S.D.C. S.D. Ga., decided November 1, 1968 16

Merchants Insurance Company v. Lilgeomont, Inc., 84 F.2d 685 (5th Cir. 1936) 15

Michelsen v. Penney, 135 F.2d 409 (2nd Cir. 1943) 18

Nisbet v. Lawson, 1 Ga. 275, 287 (1846) 9

Peacock Construction Company v. Erickson's, 121 Ga. App. 544, 174 S.E.2d 276 (1970) 12

Petersen v. Klos, 433 F.2d 911 (5th Cir. 1970) 18

Reeves v. Beardall, 316 U.S. 283, 62 S.Ct. 185 (1942) .. 11

Roberts v. Prior, 20 Ga. 561 (1856) 9, 10

Texaco, Inc. v. Lirette, 410 F.2d 1064 (5th Cir. 1969) .. 18

The Travelers Indemnity Company v. Erickson's, Inc., 396 F.2d 134 (5th Cir. 1968) 7

United States v. City of Rossville, 249 F.Supp. 701 (N.D. Ga. 1966) 15

STATUTES:

Code of Georgia of 1933 § 57-106 ..... 4, 18

Code of Georgia of 1933 § 57-110 ..... 4, 9

Georgia Code Annotated § 57-106 ..... 4, 18

Georgia Code Annotated § 57-110 ..... 4, 9

28 U.S.C. § 1254 2

28 U.S.C. § 1332 6

OTHER AUTHORITIES:

Encyclopedia of Georgia Law, Damages, Section 9 13

Restatement of Contracts § 337 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Travelers Indemnity Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above cause on January 25, 1972.

OPINIONS BELOW

The opinion and judgment by the Honorable Thomas J. Clary, United States Senior District Judge for the U.S. District Court, Eastern District of Pennsylvania,

sitting by designation, were dated April 28, 1971 and May 16, 1971, respectively, and were entered on May 3, 1971 and May 20, 1971, after the same had been transmitted to the Clerk of the U.S. District Court for the Southern District of Georgia for filing in Civil Action No. 2073, Savannah Division (Record pp. 935-947, 948-951). Said opinion and judgment are reported at 330 F. Supp. 380 (S.D. Ga. 1971). Copies are appended to this petition in the Appendix at pp. A7-A10, A11-A12.

The per curiam opinion and judgment rendered by the United States Court of Appeals in Case No. 71-2899 on January 25, 1972, is reported at 454 F.2d 884 (5th Cir. 1972). A copy of said opinion and judgment is appended to this petition in the Appendix at pp. A15-A16.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on January 25, 1972 (Appendix pp. A16-A17). A Petition for Rehearing was filed on February 5, 1972 and was denied on February 24, 1972 (Appendix p. A17).

The statutory provision confering jurisdiction upon this Court to review the opinion and judgment in question is 28 *United States Code* § 1254, which provides as follows:

> "28 U.S.C. § 1254. *Court of Appeals; certiorari; appeal; certified questions.* Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

QUESTIONS PRESENTED FOR REVIEW

This case involves a suit by Erickson's, Inc., a plumbing, heating, and air conditioning subcontractor of Peacock Construction Company, against The Travelers Indemnity Company on a labor and material bond (Record pp. 687-693). The case was referred to a special master, who awarded the plaintiff $80,974.76, plus seven per cent (7%) prejudgment interest on said amount (Record pp. 54-63; Appendix pp. A1-A7). The amount of the prejudgment interest involved is approximately $25,000.00. The questions presented for review concern the erroneous award of prejudgment interest and the erroneous affirmance of said award by both the U.S. District Judge and the United States Court of Appeals for the Fifth Circuit (Record pp. 935-947, 948-951; Appendix pp. A7-A12, A13-A14, A15-A16), in spite of the fact that such award of prejudgment interest was clearly contrary to Georgia law.

The questions presented are:

1. Whether the Court of Appeals and the District Judge erred in allowing prejudgment interest on an unliquidated claim, where the same was clearly not recoverable under Georgia law and where said decision was in conflict with decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

2. Whether the Court of Appeals and the District Judge erred in refusing to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts, which correctly stated the Georgia law and refused to allow prejudgment interest.

3. Whether the Court of Appeals and District Judge erred in applying the law of States which allow prejudgment interest, in direct contravention of the rule

laid down in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

PERTINENT GEORGIA STATUTES

Georgia statutes that are pertinent to the case *sub judice* are § 57-106 and § 57-110 of the 1933 *Code of Georgia,* which have also been published as § 57-106 and § 57-110 of the *Georgia Code Annotated,* 1971 Revision, Book 17, pp. 757 and 762. These statutes provide, as follows:

> "57-106. *Lex loci contractus to govern interest.* —Every contract shall bear interest according to the law of the place of the contract at the time of the contract, unless upon its face it shall be apparent that the intention of the parties referred the execution of the contract to another forum; in this case, the law of the forum shall govern."

> "57-110. *Interest on liquidated demands; promissory notes payable on demand.*—All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them. In the case of promissory notes payable on demand, the law presumes a demand instantly and gives interest from date (Acts 1858, p. 90)."

STATEMENT OF THE CASE

On August 12, 1963, Erickson's, Inc., entered into a subcontract with Peacock Construction Company, under which Erickson's was to do the plumbing, heating, and air conditioning work for a new addition to the Glynn-Brunswick Memorial Hospital, Brunswick, Georgia. The subcontract was signed in Savannah,

Georgia, and all work was to be performed in Brunswick, Georgia (Plaintiff's Exhibit P-4). The amount of this subcontract was $684,400.00.

Pursuant to Georgia law and the general contract with the owner (Plaintiff's Exhibit P-1), Peacock Construction Company furnished a labor and material payment bond (Plaintiff's Exhibit P-2; Record pp. 692-693). The surety on said bond was The Travelers Indemnity Company, the Petitioner herein.

Work under the subcontract began in September 1963 and was substantially completed on or about May 31, 1966 (Defendant's Exhibit D-9). During this period, 17 change orders were issued by Peacock Construction Company. Progress payments during this time amounted to $612,551.45.

The pertinent facts relating to the issue of prejudgment interest are as follows. On April 22, 1966, Erickson's wrote a letter to the Owner that the amount owed under the subcontract at that time "approaches $100,000.00." (Defendant's Exhibit D-8; Record pp. 449-450). Copies of this letter were sent to the architects and Peacock. On that same day, April 22, 1966, Erickson's submitted its Request for Payment Number 28 to Peacock in the total amount of $89,570.26 (Plaintiff's Exhibit P-8; Record pp. 450-451). On June 16, 1966, Erickson's wrote another letter to the Owner, stating that "there is an outstanding balance of approximately $132,477.76" and attached to the letter an affidavit signed by Mr. T. W. Erickson setting forth that on June 16, 1966, Peacock owed Erickson's the said amount and that Erickson's had completed its work on the project on or about May 31, 1966. (Defendant's Exhibit D-9; Record pp. 454, 457).

On July 5, 1966, Erickson's wrote to Travelers stating that "there is an outstanding balance of approximately $117,192.18" (Defendant's Exhibit D-10; Record p. 461). No payments were made by Peacock to Erickson's between June 15, 1966 and August 31, 1966, but on the latter date, Erickson's submitted a final bill to Peacock showing a total contract price of $709,-893.28, less total payments received, for a balance due of $97,341.83 (Plaintiff's Exhibit P-8). On the same day, that is August 31, 1966, the books and records of Erickson's indicated a total amount due from Peacock of $82,162.13 (Plaintiff's Exhibit P-7; Record pp. 460-461).

On November 29, 1966, in an effort to compromise this matter, Peacock issued its check to Erickson's for $77,646.58. At that time, Erickson's contention was that the total contract price should be $709,893.28. Peacock's records indicated that the total contract price, including all approved change orders, amounted to $692,143.84 and that there were back charges against Erickson's in the amount of $9,363.81. Both parties agreed that the total payments made from Peacock to Erickson's was $612,551.45. Peacock contended that it only owed $70,228.58, while Erickson's demanded $97,-341.83. Thus, it is seen that there was an obvious dispute as to the total amount owed under the subcontract and that the demand of Erickson's was clearly unliquidated.

On December 16, 1966, Erickson's, Inc., a Georgia corporation, filed suit in the U.S. District Court on the labor and material payment bond issued by The Travelers Indemnity Company, a Connecticut corporation (Record pp. 687-693). Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332, which pro-

vides, *inter alia:* "(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States;..."

The original complaint was in four counts and alleged a total indebtness under the subcontract in the amount of $96,836.40, plus interest at seven per cent (Record p. 691). The complaint alleged that the $96,836.40 *ad damnum* represented sums due for specified work, work done under change orders, items of extra work, and damages for delay.

On February 1, 1967, Erickson's filed a motion for partial summary judgment in the amount of $77,646.58, based on the tender of the check in that amount on November 29, 1966 (Record pp. 704-705), by Peacock. This partial motion for summary judgment was granted by the District Court on April 6, 1967 (Tr. 764-676). Travelers appealed (Record p. 767) and, although the appeal was dismissed on the ground that it was from an interlocutory order, the Fifth Circuit Court of Appeals stated that the District Judge erred in granting the partial motion for summary judgment and should vacate said order. See, *The Travelers Indemnity Company* v. *Erickson's, Inc.*, 396 F.2d 134 (5th Cir. 1968).

On May 6, 1969, the case was referred to a special master (Record pp. 777-779). Subsequently, the case was tried before the Honorable Perry Brannen, Special Master, in Savannah, Georgia. The transcript of the evidence and proceedings appear at pages 1 through 685 of the Record. On March 15, 1971, the Special Master entered a report which awarded Erickson's the sum

of $79,592.39, plus seven per cent prejudgment interest (Appendix pp. A1-A7; Record pp. 866-877).

In May 1971, the District Judge entered an order and judgment in which the principal was reduced to $79,058.24, allowing a set-off in the amount of $536.15, and the award of prejudgment interest in the amount of approximately $25,000.00 was affirmed (Appendix pp. A7-A10, A11-A12; Record pp. 935-951). See *Erickson's, Inc.* v. *The Travelers Indemnity Company,* 330 F. Supp. 380 (S.D. Ga. 1971). Travelers filed a motion for new trial and rehearing and a motion to amend findings of fact, conclusions of law and judgment (Record pp. 951-956). These motions were overruled by the District Judge in an order entered on July 27, 1971 (Appendix pp. A13-A16; Record pp. 948-951), and Travelers appealed (Record p. 961).

On January 25, 1972, the Fifth District Court of Appeals entered an order and judgment affirming the award of prejudgment interest (Appendix pp. A15-A16). See, *Erickson's, Inc.* v. *The Travelers Indemnity Company,* 454 F.2d 884 (5th Cir. 1972). The petition for rehearing was denied on February 24, 1972 (Appendix A17).

ARGUMENT

I.

The Court of Appeals and the District Judge erred in allowing prejudgment interest on an unliquidated claim, where the same was clearly not recoverable under Georgia law and where said decisions were in conflict with decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

The Court of Appeals and the District Court both erred in allowing prejudgment interest, in the amount of approximately $25,000.00, on an unliquidated claim.

These decisions are in conflict with decisions of both the Supreme Court of Georgia and the Court of Appeals of Georgia—*viz., First National Bank of Atlanta* v. *State Highway Department,* 219 Ga. 144, 132 S.E.2d 263 (1963); *Brown* v. *Parks,* 190 Ga. 540, 9 S.E.2d 897 (1940); *Fireman's Insurance Company* v. *Oliver,* 182 Ga. 212, 184 S.E. 858 (1940); *Lincoln Lumber Company* v. *Keeter,* 167 Ga. 231, 145 S.E. 68 (1928); *Roberts* v. *Prior,* 20 Ga. 561 (1856); and *Nisbet* v. *Lawson,* 1 Ga. 275, 287 (1846); *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, 139 S.E.2d 145 (1964); and *Cowart* v. *Reeves,* 80 Ga. App. 161, 55 S.E.2d 911 (1949). These decisions have uniformly held that prejudgment interest cannot be allowed on an unliquidated claim. Moreover, this principle was codified in § 57-110 of the 1933 *Code of Georgia,* unofficially published as § 57-110 of *Georgia Code Annotated,* which provides that interest accrues only on "liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain. . . ."

In *First National Bank of Atlanta* v. *State Highway Department,* 219 Ga. 144, at page 147, the rule was stated as follows:

> "All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them; . . ." *Code* § 57-110. A liquidated demand is 'an amount *certain* and *fixed,* either by the act and agreement of the parties or by operation of law; *a sum which cannot be changed by the proof;* . . ." *Nisbet* v. *Lawson,* 1 Ga. 275, 287; *Hargroves* v. *Cooke,* 15 Ga. 321 (12); *Bartee* v. *Andrews,* 18 Ga. 407; *Roberts* v. *Prior,* 20 Ga. 561; *Lincoln Lumber Co.* v. *Keeter,* 167 Ga. 231, 236 (145 S.E. 68); *Firemen's Ins. Co.* v. *Oliver,* 182 Ga. 212 (184 S.E. 858)."

In *Brown* v. *Parks,* 190 Ga. 547, at page 546, the Georgia Supreme Court said:

> "6. The judge and the auditor properly refused to allow interest in favor of the plaintiff against the administrator, except from the date of the auditor's report, then for the first time fixing any liquidated amount due to the plaintiff."

In 1856, in *Roberts* v. *Prior,* 20 Ga. 561, Justice Lumpkin, who was appointed to the Supreme Court when it was first established in Georgia in 1846, stated:

> "[2] we had supposed that if anything was settled, this point was. In *Nisbet* and *Lawson,* we stated the rule to be, that whenever the demand was fixed and certain, either by the agreement of the parties or by operation of law, that it was liquidated, with or without writing. And Mr. *Bouvier* says: 'Liquidated' is that which is made clear, certain, manifest; as, liquidated damages, ascertained damages; liquidated debt, an ascertained debt, as to amount. A debt is liquidated when it is certain what is due and how much is due: *cum certum est an et quantum debeatur.* For although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated.
>
> [3] An unliquidated claim is one which one of the parties to the contract cannot alone render certain. (2 *Bouvier's Law Dictionary,* p. 86.)"

In determining whether Erickson's claim was unliquidated, the nature of the claim must be considered. Although Erickson's set out its claim for damages in five separate counts, the first four in the original complaint claiming a total of $96,836.40 and Count V in the amount of $3,849.15, all arise out of the same contract and the same transaction between the parties and,

as a result, constitute a single claim. When the lower Court granted a partial summary judgment and Travelers appealed to the Fifth Circuit Court of Appeals, it contended that the lower Court did not have authority or power to grant a partial summary judgment where the overall cause of action arose out of a single claim against Travelers. It is still the contention of Travelers that there was but one contract and a single claim for monies due under the contract. The attempt of Erickson's to compartmentalize the items of damage cannot change the nature of Erickson's claim. As a result, Counts II, III, IV and V of the Complaint have no independent existence separate and apart from the contract and, as a result, the Complaint stated a single claim simply composed of several elements of damage. See *Marino* v. *Nevitt*, 311 F.2d 406 (3rd Cir. 1963). In order to have separate claims, the items alleged in a complaint must arise out of wholly separate and distinct transactions. *Reeves* v. *Beardall*, 316 U.S. 283, 62 S.Ct. 185 (1942); and *Coffman* v. *Federal Laboratories, Inc.*, 171 F.2d 94 (3rd Cir. 1948). In the *Reeves* case, this Court stated, as follows:

> "The rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action'. *Atwater* v. *North American Coal Corporation*, 111 F.2d 125, 126 (2nd Cir.) . . . The judgment here in question meets that test. The claim against respondent on the promissory note was unrelated to the claim on the contract not to change the will. *Those two claims arose out of wholly separate and distinct transactions* or engagements." (Emphasis supplied)

Since all of the items of damage alleged by Erickson's arose out of the work done under one subcontract, there is but a single claim which is unliquidated.

That the amount in controversy was an unliquidated demand is clearly demonstrated by the conflicting claims and contentions of Erickson's, Inc., on different occasions between April 22, 1966 and November 29, 1966, that the amount owed was $100,000, $89,570.26, $132,477.76, $117,192.18, and $97,341.83.[1] Further evidence that the claim was unliquidated is that, while the amount originally sued for was $96,836.40 (Record p. 691), the award of the special master, as reduced by the District Judge to allow an offset of $536.15, was only $79,058.24. The fact that the award was substantially less than any amount ever demanded by Erickson's and substantially less than the amount sued for makes it clear that this was not a case in which the parties to the contract could alone render certain. See, *Lincoln Lumber Company* v. *Keeter,* 167 Ga. 231, at page 236, in which the Supreme Court of Georgia held, as follows:

> "A debt is liquidated when it is certain how much is due and when it is due. An unliquidated claim is one which one of the parties to the contract or the transaction cannot alone render certain. *Roberts* v. *Prior,* 20 Ga. 561. The general rule is that interest is not recoverable upon unliquidated demands, but is allowable only after such demands shall have become merged in a judgment. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped. Where parties agree to submit the amount of a demand to the decision of others, or to be determined by the Court, interest will not be allowed prior to the date of such decision."

---

[1] A state court complaint pertaining to these conflicting claims was held to state a cause of action for libel. See *Peacock Construction Company* v. *Erickson's, Inc.,* 121 Ga. App. 544, 174 S.E.2d 276 (1970).

Another statement of the applicable law of Georgia is set forth in 8 *Encyclopedia of Georgia Law,* Damages, Section 9, page 35, wherein it is stated:

> "A debt or demand is liquidated when agreed on by the parties or fixed by operation of law. An unliquidated claim is one which one of the parties to a contract cannot alone render certain. Liquidated damages are those which are clear, certain, manifest, and ascertained. A liquidated debt is an ascertained debt as to amount. *Although it may appear that something is due, if it does not appear how much is due, the debt is not liquidated.* A debt is liquidated when it is rendered certain what is due and how much is due. . . . A liquidated claim is one which cannot be changed by proof. It is so much or nothing." (Emphasis supplied)

Apparently, the Court of Appeals and the District Judge felt that the fact that Peacock offered to compromise the claim for $77,646.58 was an admission of liability that made the amount liquidated. In this regard, both Courts erred, since it is clear that a conditional tender in an effort to compromise a claim does not amount to a liquidation. *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, 139 S.E.2d 145 (1964); and *Lumbermen's Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Manufacturing Company,* 262 F.2d 63 (5th Cir. 1958).

In *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, at page 535, the Georgia Court of Appeals, in commenting on the effect of such a conditional tender, stated:

> "Furthermore, the tender of the $5,500 was made on the condition that it be accepted as full and complete settlement of all sums due by it under

> the policy. The tender was not accepted and the amount fixed by the jury was the liquidated sum found to be due and it does not bear interest until after the jury verdict liquidating the amount recoverable. *Fireman's Ins. Co.* v. *Oliver,* 182 Ga. 212 (184 S.E. 858)."

In *Lumbermens Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Mfg. Co.,* 262 F.2d 63, the Fifth Circuit Court of Appeals stated, at page 67:

> [9] Plaintiff has also argued that interest should be awarded on $35,000.00, or at least $31,569.97, from the date when suit was filed, in view of the fact that defendant's answer to the amended complaint stated that it offered $35,000.00 in settlement of the claim prior to the filing of suit. We agree with defendant's reply that a settlement offer is an offer to compromise disputed issues and is not a liquidation of a claim unless it is accepted."

Petitioner respectfully submits that, Peacock having tendered a fair sum as an offer of compromise, even though the tender was conditional upon accepting it as full and final settlement, and Erickson's having refused the tender and filed suit for a sum approximately $20,000 more than Peacock contended in good faith was due, there was but one course of action for Peacock to follow. There was a legitimate dispute and the mere fact that the matter did not come to trial for more than three years from the time the suit was filed should not affect the ultimate outcome of the case.

The tender by Peacock of the check dated November 29, 1966, in the amount of $77,646.58, represented its appraisal of its ultimate liability and was not intended as an amount to be credited on the amount of loss to be found by the jury. While Erickson's was successful at

the trial in avoiding Peacock's assessment of the claim by recovering a total of $79,058.27, it is submitted that the amount fixed by the Special Master was the liquidated sum and that no part of that sum should bear interest prior to the date of judgment, that is, May 20, 1971. The mere fact that Peacock admitted it owed some amount of money does not make the claim of Erickson's liquidated.

Based upon the foregoing, Travelers respectfully submits that the Court erred in awarding interest on any sums of money prior to the date of judgment.

II.

The Court of Appeals and the District Judge erred in refusing to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts, which correctly stated the Georgia law and refused to allow prejudgment interest.

Petitioner shows that the decisions of the Court of Appeals and the District Judge are in conflict with prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts —*viz., Browne* v. *Makin,* 177 F.2d 753 (5th Cir. 1949) (a case involving a special master); *Merchants Insurance Company* v. *Lilgeomont, Inc.,* 84 F.2d 685 (5th Cir. 1936); *Aetna Insurance Company of Hartford, Conn.* v. *Taylor,* 86 F.2d 225, 227 (5th Cir. 1936); *Lumbermen's Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Manufacturing Company,* 262 F.2d 63 (5th Cir. 1968); *Eastern Federal Corporation* v. *Abco-Embassy Pictures Corporation,* 331 F.Supp. 1253 (N.D. Ga. 1971); *United States* v. *City of Rossville,* 249 F.Supp. 701 (N.D. Ga. 1966); unreported decision of Judge F. M. Scarlett in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, U.S.D.C. S.D. Ga., decided November 1, 1968 (a case involving a special

master and another subcontract on the same construction project as the present case) (Appendix pp. A18-A-22); and unreported decision of Judge F. M. Scarlett in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, U.S.D.C. S.D. Ga., decided November 1, 1968 (a case involving a special master and the construction of Tift County Hospital) (Appendix pp. A23-A26). The cited cases fully discuss the Georgia law pertaining to the allowance of prejudgment interest and constitute clear precedents that should have been followed in this case.

In *Brown* v. *Makin,* 177 F.2d 253, a case involving a special master, the Court of Appeals for the Fifth Circuit held as follows:

> "As to appellee's claim for interest, it need only be said that interest runs from the date of the judgment and not from the date of the jury's verdict. The claims here were not liquidated or even ascertainable until the master made his findings. Under Georgia law, interest is not recoverable on an unliquidated demand."

In two unreported cases, presenting the same issue as to whether prejudgment interest should be allowed, the Honorable Frank M. Scarlett, U.S. Senior District Judge for the Southern District of Georgia, held that the special master erred in including prejudgment interest in his award. One of these cases, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, involved another subcontract on the same construction project, the addition to the Glynn-Brunswick Hospital, Brunswick, Georgia, that is involved in the present case. The other case, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, arose out of a subcontract

in connection with the construction of the Tift County Hospital. Copies of the judgments and special master's reports are set out in the Appendix at pages A17-A26.

In his order dated May 3, 1971, awarding prejudgment interest (Record pp. 935-948), Judge Clary did not follow the law of Georgia, but relied upon decisions from other jurisdictions which allow prejudgment interest even where the amount in controversy is not liquidated (Record p. 938). Under *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), both the District Court and Fifth Circuit Court of Appeals must apply the law of Georgia, not the law of other states. Appellant submits that the failure to properly apply the law of Georgia was due to the fact that Judge Clary normally sits in Philadelphia, Pennsylvania, and, therefore, was not as familiar with the law of Georgia as the authors of the opinions in the decisions of the Fifth Circuit Court of Appeals and Georgia District Courts previously referred to herein. All of those cases make it quite clear that, insofar as Georgia law is concerned, there can be no award of prejudgment interest where the amount in controversy is unliquidated.

III.

The Court of Appeals and the District Judge erred in applying the law of States which allow prejudgment interest, in direct contravention of the rule laid down in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

In addition to the erroneous holding that Erickson's claim was liquidated, the District Judge went further and held that, even if the claim was not "liquidated,"

Erickson's would still be entitled to prejudgment interest, citing three cases from other jurisdictions—*i.e., Aetna Casualty & Surety Co.* v. *U.S.*, 365 F.2d 997, 1006 (8th Cir. 1966); *Michelsen* v. *Penney*, 135 F.2d 409 (2nd Cir. 1943); and *Fluor Corporation* v. *U.S. ex rel Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969). The affirmance of such holding by the Court of Appeals is clearly not in accord with the prior decisions of this Court or the prior decisions of the Fifth Circuit Court of Appeals—*viz., Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Petersen* v. *Klos*, 433 F.2d 911 (5 Cir. 1970); and *Texaco, Inc.* v. *Lirette*, 410 F.2d 1064 (5 Cir. 1969).

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, the question arose as to the applicability of a New York statute which directed that in contract actions, interest should be added to the principal sum "whether theretofore liquidated or unliquidated." In its opinion, at page 497, this Court stated:

> ". . . the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

In *Peterson* v. *Klos*, 433 F.2d 911 (5 Cir. 1970), the Court of Appeals for the Fifth Circuit stated:

> "We agree with the parties that in this diversity case state law governs the award of interest."

That Georgia law is to be applied is further made clear by § 57-106 of the 1933 *Code of Georgia*, also published as § 57-106 of *Georgia Code Annotated*, which provides that:

> "Every contract shall bear interest according to the place of contract, unless upon its face it

shall be apparent that the intention of the parties referred the execution of the contract to another forum; in this case, the law of the forum shall govern."

The subcontract dated August 12, 1963 (Plaintiff's Exhibit P-4), was signed in Savannah, Georgia, and all work was to be performed in Brunswick, Georgia. No mention was made of any other forum. Therefore, the Georgia law as to prejudgment interest must be applied.

The decisions relied upon by the District Judge and the Court of Appeals in allowing prejudgment interest involved the law of Arizona, California, New York, and South Dakota, where a different rule of law appertains as to the allowance of prejudgment interest on unliquidated claims. The rule of law stated in such decisions is followed in many jurisdictions, including Pennsylvania, where Judge Clary normally holds court, and is the rule stated in § 337 of the *Restatement of Contracts*. However, as this Court said in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, the proper function of a Georgia federal court is to ascertain what the state law is, not what it ought to be. Thus, it was error for the District Judge and the Court of Appeals to fail and refuse to apply controlling Georgia law.

IV.

Conclusion

Petitioner shows that the Court of Appeals and the District Judge both erred in allowing prejudgment interest on an unliquidated claim. The holdings of both courts are in direct conflict with Georgia statutes and decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia that, for more than 125

years, have uniformly held that prejudgment interest cannot be awarded on an unliquidated claim. Moreover, both courts ignored and refused to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts which have correctly applied the Georgia law and refused to allow prejudgment interest under similar circumstances. Finally, in applying the law of States other than Georgia, both Courts acted in direct contravention to the holding in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, that the treatment of interest in diversity cases is a matter of State law.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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